

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 22-CR-20552-DPG-1

UNITED STATES OF AMERICA,) VOLUME I OF I
) PAGES: 1 - 33
PLAINTIFF(S) ,)
)
VS.) DATE OF PROCEEDINGS:
) JULY 28, 2023
)
) COURTROOM #11-1
DAVID RIVERA,) WILKIE D. FERGUSON, JR.
ESTHER NUHFER,) UNITED STATES
DEFENDANT(S) .) COURTHOUSE

TRANSCRIPT OF DEFENSE MOTION TO VACATE PROCEEDINGS
BEFORE THE HONORABLE DARRIN GAYLES,
UNITED STATES DISTRICT JUDGE, AT
400 NORTH MIAMI AVENUE,
MIAMI, FLORIDA 33128.

APPEARANCES

FOR THE GOVERNMENT: HAROLD E. SCHIMKAT, ESQ.,
NALINA SOMBUNTHAM, ESQ.,
JOSHUA PASTER, ESQ.
UNITED STATES ATTORNEY'S OFFICE
99 NE 4 STREET, 4TH FLOOR
MIAMI, FLORIDA 33132

FOR THE DEFENDANT(S) : EDWARD ROBERT SHOHAT, ESQ.,
DAVID RIVERA DAVID WEINSTEIN, ESQ.,
NINA GARCIA, ESQ.
JONES WALKER, LLP
MIAMI CENTER
201 S. BISCAYNE BOULEVARD.
SUITE 3000
MIAMI, FLORIDA 33131

Stenographically Reported By:
Quanincia S. Hill, RPR
Federal Official Court Reporter
400 North Miami Avenue
Miami, Florida 33128

FOR THE DEFENDANT(S) : DAVID OSCAR MARKUS, ESQ. ,
ESTHER NUHFER ANITA MARGOT MOSS, ESQ.
 MARKUS/MOSS, PLLC
 40 NW THIRD STREET
 PENTHOUSE ONE
 MIAMI, FLORIDA 33131

Stenographically Reported By:
Quanincia S. Hill, RPR
Federal Official Court Reporter
400 North Miami Avenue
Miami, Florida 33128

1 (Proceedings commencing at 10:00 a.m.)

2 **THE COURTROOM DEPUTY:** Calling case number 22-20442,
3 criminal, the *United States of America versus David Rivera and*
4 *Esther Nuhfer*.

5 Counsel, please state your appearances beginning with
6 the Government.

7 **AUSA SCHIMKAT:** Good morning, Your Honor. Harry
8 Schimkat for the United States. With me on asset forfeiture
9 matters are Nalina Sombuntham and Josh Paster.

10 **THE COURT:** All right. For the Defense.

11 **ATTORNEY SHOHAT:** Good morning, Your Honor. Ed Shohat,
12 David Weinstein and Nina Garcia, Jones Walker, LLP for David
13 Rivera. Mr. Rivera is to my right in the courtroom.

14 **THE COURT:** All right.

15 **ATTORNEY MARKUS:** But not me. I'm also to his right.
16 David Markus and Anita Margo Moss for Esther Nuhfer.

17 **ATTORNEY MOSS:** Good morning.

18 **THE COURT:** And is Ms. Nuhfer here?

19 **ATTORNEY MARKUS:** Yes. She's right here.

20 **THE COURT:** All right. We're here for -- pursuant to
21 the Defense motion. Well, we received a defense motion to
22 vacate. I was actually already setting this for a status. In
23 any event, I had assumed that this was going to be an issue
24 that we have to discuss. This is not the actual hearing on the
25 motion. So -- but I want to discuss where we are. And so why

1 don't I hear first from the Defense since you filed the pending
2 motion.

3 **ATTORNEY SHOHAT:** Well, it's pending -- there are two
4 motions pending before you right now, pleadings pending before
5 you: The Government's objections to Judge Torres' order
6 granting our motion to lift the *lis pendens*, and our motion to
7 vacate the *ex parte* restraining order.

8 We have, in our motion to vacate the *ex parte*
9 restraining order, asked for an extension from the normal
10 14 days that we would have to respond, to 30 days on both the
11 Government's objections and is to the *ex parte* restraining
12 order. The Government's filed a response on our motion to
13 vacate the *ex parte* restraining order. And we wanted to get
14 from Your Honor their views on their response generally. And
15 we filed two days ago a reply to that.

16 Now, Mr. Markus is travelling next week for a
17 sentencing out of town. And we need an extension cause on the
18 objections to the to Judge Torres' order. Those are the
19 matters that are currently pending before Your Honor.

20 **THE COURT:** Okay. So for the joint motion, so that's
21 now fully briefed, right?

22 **ATTORNEY MARKUS:** What's fully briefed, Your Honor, is
23 the joint motion to vacate the protective order.

24 **THE COURT:** Right.

25 **ATTORNEY MARKUS:** And you can probably tell from our

1 pleading that we were upset about what happened in the
2 procedural, how the Government proceeded on those properties.

3 What had happened was we had litigated over the past
4 five months on this *lis pendens* issues what the Government
5 labelled in the indictment as substitute assets. We win before
6 Judge Torres. Judge Torres said you can't place the *lis*
7 *pendens* on substitute asset. The Government then, on the same
8 properties, comes *ex parte* to this Court as we're discussing
9 with them how to proceed, instead of filing a normal motion and
10 letting us respond to it, they come *ex parte* and say, we can
11 now trace it only after they lost before Judge Torres. We
12 thought that was wrong to do it that way. And so what we're
13 asking the Court to do is give us an opportunity to respond to
14 their motion that they filed *ex parte*. We believe they're
15 totally wrong on both the merits and how they're proceeding.
16 And so we'd just like an opportunity to respond to that motion
17 before the Court rules that those properties are restrained.

18 **THE COURT:** So does it matter procedurally whether or
19 not, on the *ex parte* motion from the Government, does it matter
20 procedurally whether or not the Court's order granting the
21 motion is vacated and we start from square 1, or I take it up
22 essentially as a motion for reconsideration?

23 **ATTORNEY MARKUS:** Well, I think we would prefer it to
24 be vacated for a couple reasons. The Government thinks that
25 once there's an order in place, that we have extra hurdles that

1 we need to satisfy to get it vacated. In other words, in the
2 normal case where they haven't litigated a *lis pendens* for five
3 months, where they haven't indicted these properties as
4 substitute assets, they may come to the Court and say, hey, *ex*
5 *parte*, we're concerned that the Defense may alienate these
6 properties, we need an *ex parte* order.

7 Once that's done, there are some cases, and we'll
8 dispute about whether this is necessary or not, but the
9 Government says the Defense then needs to show need to get
10 access to those properties. They need to show that they need
11 that money or those assets for counsel. We dispute that. But
12 if the -- if the order's not in place, if we're just responding
13 in the normal course and we can show that they can't trace,
14 that they can't show that that money is traceable to the
15 offense, we wouldn't have to show a need. The Court would just
16 side with us, in other words, and not grant a restraint.

17 So we believe the reason they went *ex parte* is because
18 they knew that if they got this order in place, there would be
19 extra hurdles that we would need to jump over to get access to
20 that proper. And that's why we think it was wrong for them to
21 do it that way.

22 **THE COURT:** All right.

23 **ATTORNEY SHOHAT:** Let me add just one thing, if you
24 don't mind, Your Honor.

25 When they came to Your Honor *ex parte*, they relegated

1 the whole litigation before Judge Torres to a single somewhat
2 opaque footnote without laying out the details of five months
3 of litigation and causing Judge Torres to enter a 23-page order
4 which ultimately granted our motion to lift the *lis pendens*.
5 It is simply wrong, respectfully, to proceed that way. And
6 important, and I think it's an important value in the criminal
7 justice system that the Government not be allowed to get away
8 with doing that. They should have, first of all, as David
9 alluded to, we were in the process of discussing how to proceed
10 with them on the *lis pendens* issue, and they weren't telling us
11 that at that very time they were going *ex parte*. We had no
12 hint until we saw it that that's exactly what they did.

13 And it's simply wrong. And the appropriate procedure
14 here would be not to recognize that -- that kind of proceeding
15 by the Government under these unique circumstances where these
16 very properties are being litigated. And let us start by
17 treating their motion as a regular motion, not *ex parte*, and
18 allowing us to respond to it out right.

19 **THE COURT:** So are you suggesting that this kind of
20 motion could not be submitted *ex parte*?

21 **ATTORNEY SHOHAT:** No, Your Honor. That's not what
22 we're suggesting. We're suggesting in this particular
23 circumstances of this case, the fact that the statute
24 authorizes, under certain circumstances, the Government to
25 proceed *ex parte*, we recognize that. But the -- but the basis

1 for that law is that there is some risk of alienation of the
2 properties that creates a interest of the Government to proceed
3 *ex parte* and get a restraining order. There was no such risk
4 here. And beyond that, these very properties were in
5 litigation, they had lost a motion. And only after they lost
6 their effort to sustain the *lis pendens*, only then did they,
7 behind everybody's back, proceed *ex parte*, relegating the
8 motion before Your Honor, the *ex parte* motion, relegating all
9 that litigation to a footnote. It's just not right. And I
10 don't think the Court respectfully should countenance that
11 process.

12 When there was no risk of alienation of those
13 properties, zero, the *lis pendens* are in place.

14 **THE COURT:** Okay. Before I hear from the Government, I
15 do want to make sure we're all clear about one thing: I was
16 fully aware of the litigation that occurred before Judge
17 Torres. And I reviewed the report and recommendation and the
18 objections at the same time I reviewed the *ex parte* order --
19 the *ex parte* motion. And again, I knew that we were ultimately
20 going to get to this point where we are going to be litigating
21 these issues because it was strongly contested those issues
22 about the *lis pendens* before Judge Torres. Of course, the kind
23 of motion, the subject of the *ex parte* motion, as I understood
24 it, is something that can be handled *ex parte*. The issue was
25 whether or not it should be handled *ex parte*.

1 And so the issue for the Court, I have -- I had
2 questions which I'm going to address with the Government today:
3 Do I further -- I didn't think it was appropriate for me to
4 then have *ex parte* communications with the Government to ask
5 those questions, especially under the circumstances. So
6 having, at that time, found probable cause, I looked at the
7 assets at issue. I thought it was better to proceed and then
8 come back and deal with the issue.

9 So I don't want anyone to have the impression that I
10 didn't understand what was going on. I understood fully what
11 was going on. But I knew that this was going to be an issue
12 that we were going to have to discuss again.

13 **ATTORNEY SHOHAT:** Just so we're clear, Your Honor: I
14 didn't mean to suggest that Your Honor wasn't fully aware of
15 what was going on for five months before Judge Torres. What I
16 meant to suggest is the way the Government treated it in an *ex*
17 *parte* motion without fully explaining it and giving the Court
18 the opportunity at least to say, why are we proceeding *ex parte*
19 here, that's what seems strange to us. And there was in my --
20 in our view, absolutely no reason, notwithstanding the fact
21 that the statute authorizing it. Statutes authorize a lot of
22 things but that doesn't mean it's necessarily right to do it.
23 And it's not right to do it in this circumstance.

24 **THE COURT:** Well, it did seem strange to me under the
25 circumstances. And I turn to the Government now to explain why

1 things were submitted in this fashion. For example, when did
2 you know that the -- what were formally designated as
3 substitute assets were tainted assets? I'd like to know when
4 you realized that. And if it was before Judge Torres issued
5 his report, why -- whether you notified him. And if you
6 didn't, why not.

7 So who would like to address those issues?

8 **AUSA SOMBUNTHAM:** Good morning, Your Honor. Nalina
9 Sombuntham on behalf of the United States. I'll be addressing
10 these questions.

11 I think, on the Government's end, we fully anticipated
12 that there would be litigation and consternation from the
13 defendants. And we tried to tee up this matter before the
14 Court in a way that was consistent with district practice and
15 to minimize litigation. I don't know if we achieved that goal
16 standing here today but I wanted to get into it a little bit
17 first.

18 On the issue about -- and I want to make one thing
19 clear: On the issue of filing it *ex parte* or filing it on the
20 docket, the challenge itself, the hurdles that Mr. Markus was
21 raising, would be there regardless. Yesterday, and we did not
22 cite this in our response, but we did provide a citation to
23 defense counsel yesterday. And it so happens that Mr. Shohat
24 was involved in litigation in 2011 in *United States versus*
25 *Steiner*. It was a case indicted in 2008. And the Government

1 sought protective orders for real property in that case. And
2 Judge O'Sullivan, after hearing from all parties prior to the
3 restraint, ultimately concluded the same thing that we are
4 advocating here, a post-restraint challenge where defendants
5 would need to make a showing of need and convince the Court
6 that the *Barker* factors weigh in their favor to take this
7 challenge up prior to trial in the interest of due process
8 rather than just at trial.

9 And so no matter how it was presented to the Court, it
10 would still be the same litigation on the back end. And so
11 rather than delay proceedings further in the light of Judge
12 Torres' orders and defense -- defendants' unwillingness to
13 pursue a stay, we presented an *ex parte* as a normal course.

14 I know Your Honor has reviewed many applications in the
15 past where we've asked for protective orders *ex parte*. That
16 was the procedure that was in place in *Kaley*, in most recently
17 in the *Gosney* case, that was affirmed by the Eleventh Circuit
18 this year in February. And so I think no matter how we present
19 it, we would end up in this space.

20 Understanding that there might be an issue, we included
21 in our application, not only the footnote but it's exhibit with
22 the entire order because we wanted to make sure that the Court
23 had everything before it, you know. We know that you're aware
24 of the litigation. But in case when you're reviewing this, it
25 wasn't front and center, we wanted to make sure that

1 application package was complete.

2 When we were able to finalize the package and submit
3 it, we also told counsel at that juncture that we were -- we
4 had changed our position. And this goes to your question I
5 think Your Honor just asked, which is: When did we know?
6 We've been always investigating these assets. They appear on
7 the indictment because we're aware of the assets in the first
8 instance. And that investigation, as Your Honor's aware from
9 the application itself and the tracing chart that we supplied
10 in support, that we also have given now to defense counsel,
11 which we requested to be able to do so in the actual second
12 protective order, that is a significant undertaking. It takes
13 time. It takes review of bank records and subsequent
14 investigation and everything else.

15 And so although we had been working towards that, I
16 think I can speak for all of us here on July 6th, July 7th, or
17 shortly after the July 4th holiday, we were caught a little bit
18 off guard that Judge Torres was going to issue the orders. We
19 had been trying to finalize the package for grand jury
20 presentment. And the truth is that we had not been able to do
21 so prior to Judge Torres' orders. And I think, you know, if we
22 could have saved ourself that timeline, we would have
23 definitely done so.

24 **THE COURT:** So I want to get back to you became aware
25 that these were tainted assets. When did the Government --

1 when did agent come to you and say, we can trace the money from
2 these accounts to these properties? When did that occur?

3 **AUSA SOMBUNTHAM:** I mean, it's not as simple as that,
4 Your Honor. So what happens is that we had to first identify
5 assets, and then we had commence tracing. There was a healthy
6 suspicion based on how the bank accounts were that all the
7 assets that we had identified may be traceable to the charged
8 offenses. I think you're aware of this is excess of
9 \$20 million that were deposited into these accounts. These
10 assets were either purchased or paid off during the timeframe
11 of the offense. These are things that I think both defendants
12 and counsel are aware of as well as the United States.

13 It took -- we had to engage forensic accountants. They
14 go through a trace, we look at the trace, we review it to make
15 sure it's a sound one. I know we present for probable cause.
16 But we want to be able to show and substantiate that in a
17 detailed manner. And so it took weeks of litigation, I mean
18 weeks of review while that litigation was going on.

19 And so I think fairly, probably towards end of May,
20 June, we were finalizing overall, and so at that time, and
21 again, it was not -- it was not actually final. Up until the
22 submission of the *ex parte* package, the agent was still
23 reviewing evidence in support of probable cause. We were still
24 that very week reviewing with the forensic accountants tracing.
25 And so we presented and we advised defense counsel of our

1 position when we were certain because in light of the fact that
2 if there -- if we weren't certain, I think we would still be in
3 this position where they would say that government counsel
4 indicated that assets were tainted when they were not.

5 And so I don't know if we would be in a different
6 position particularly. It might be a different issue before
7 the Court.

8 And I think -- I think the other thing to recognize,
9 and we would support with Eleventh Circuit precedence in
10 *Bissell* in that the procedure that we are advocating for that
11 was set forth there in *Bissell* but also used in *Kaley* and
12 affirmed in *Gosney* is that there's no pretrial restraint
13 hearing. And so even if we had filed and we had this
14 proceeding, we would still end up in the same position. And so
15 the Congress -- I think, I think Mr. Shohat was going over what
16 the intent of *ex parte* was in the statute. We reviewed that
17 very carefully as well. And it's not only the dissipation of
18 assets, but there's a strong presumption that if there is
19 probable cause, restraint should be in place and only if there
20 are constitutional issues to implicate the Sixth Amendment or
21 the Fifth Amendment should there be a hearing. So that is
22 always post restraint. And *Bissell* makes that clear. *Kaley*
23 makes that clear. And *Gosney* makes that clear. And that also
24 comports with the Supreme Court's holding in *Monsanto* where if
25 the Court finds probable cause, it should issue a restraining

1 order.

2 **THE COURT:** I get all that. But what you're telling me
3 is the Government was aware in May or June that the properties
4 that you designated as substitute assets were actually tainted
5 assets subject to -- subject to forfeiture. And you let Judge
6 Torres -- well, you let litigation continue and you let Judge
7 Torres spend a lot of time taking up issues unnecessarily.
8 That's what it sounds like to me.

9 **AUSA SOMBUNTHAM:** Your Honor, I'd like to make one
10 thing clear. There are five assets that are being released.
11 There's two substitute real properties that's still subject to
12 litigation. And I know you're distilling to the fact that we
13 were aware and made him do it. That's not the case. We very
14 much are aware of potential crimes, potential assets. We do
15 the analysis. It is the Government's burden to show probable
16 cause. We take that very seriously. And so we don't present
17 that publically to the grand jury, to Court until we're ready
18 to do so.

19 If we went on what we thought, it would be very
20 difficult for us -- we would have different issues before the
21 Court today about potential things we should have done versus
22 what we shouldn't have done. So I have to weigh that and
23 balance. We have -- we know the litigation's on going. We
24 could have also thought at the same time once we complete the
25 analysis that we simply did not have it and we shouldn't be

1 pursuing this as tainted property. And I don't know if --

2 **THE COURT:** You do understand --

3 **AUSA SOMBUNTHAM:** Yes.

4 **THE COURT:** -- this reeks of gamesmanship. The timing
5 couldn't have been worse. You waited until Judge Torres ruled
6 on the substantive issues that had been pending for quite a
7 while and then you submit the *ex parte* order. And it's not to
8 suggest that you could not submit the order *ex parte* or the
9 motion *ex parte*, generally, and whether or not there's actual
10 probable cause. It seems like you're wasting the Court's time.
11 The Defense can speak for themselves about the time that they
12 feel that they've wasted. But it seems like the Government
13 simply filed this because it lost, at least in the report and
14 recommendation, or the order, and I understand that's an issue
15 to be resolved as well.

16 **AUSA SOMBUNTHAM:** Understood, Your Honor. And I think
17 everyone at this table would wish that we could have presented
18 it in a different timeframe. And again, I emphasize the
19 timeframe was in fact the one that we had to pursue under the
20 circumstances.

21 So if we could -- if we could have done things
22 differently, I think there might have been a different result.
23 We would have. I think in this instance, no one wants to be
24 filing after the report and recommendation coming out. I don't
25 think anyone at this table had intended it that way. It just

1 simply went. We were forced to finalize and present in light
2 of defense -- defendant's unwillingness to stay.

3 **THE COURT:** So is there a danger? I mean, we're
4 talking about real property. I mean, if we -- we're not really
5 talking about assets that could be secreted quickly.

6 So I mean, Judge Torres' order, report and
7 recommendation, until I resolve the issue either adopting it or
8 not, I mean, they are still -- the *lis pendens* are still there.
9 So whether or not, you know, the order that I issued in place,
10 aren't they still restrained?

11 **AUSA SOMBUNTHAM:** So they're subject to *lis pendens*. I
12 think this is part of the communications that I outlined in our
13 response. And anticipating the Court's concern, we put maybe a
14 fuller representation of our communications post Judge Torres'
15 order. When Judge Torre's order was issued, they were titled
16 as orders. And --

17 **THE COURT:** I'm sorry. I need you to answer my direct
18 question first --

19 **AUSA SOMBUNTHAM:** Sorry.

20 **THE COURT:** -- before you move on because I don't want
21 anything to get lost.

22 Aren't they restrained in any event, whether or not
23 that order I issued most recently is in place or not?

24 **AUSA SOMBUNTHAM:** Well, they're not restrained.
25 They're subject to *lis pendens*. And the question is whether or

1 not they're going to be sold or alienated somewhat. That can
2 happen subject to *lis pendens*. The defense counsel was asking
3 us to release the *lis pendens* after Judge Torres made his
4 order.

5 **THE COURT:** There's an objection. They're not final
6 until I rule on those.

7 **AUSA SOMBUNTHAM:** Right. So this is the issue that we
8 were part of the correspondence. And I'm sorry to dive into
9 what I thought was an individual explanation is that when we
10 initially got the orders, we asked defense counsel if they're
11 willing to stay, because we were taking them as orders,
12 initially. They did not agree to the stay.

13 There's a dispute amongst the parties whether you
14 really should be considering Judge Torres' rulings as orders
15 subject to Section 636(B)(1)(A) or a report and recommendation
16 under 636(B)(1)(B). And what -- during the course of the week
17 that transpired between when Judge Torres' orders were entered
18 and the week that we sought probable cause determination from
19 the Court on the restraining order, we were putting together
20 the package as well as researching this issue about whether the
21 fairly, the report should be considered as an appeal or should
22 it be considered as an R and R.

23 So the question still remains as to whether the *lis*
24 *pendens* are valid because Judge Torres voided, as part of his
25 order, the *lis pendens*. And so I understand defense counsel's

1 position that they were in communications with us and they may
2 not have been any risk; but their unwillingness to agree to a
3 stay and everything else that was going on. And understanding
4 that already we were in a timeline that I think the Court has
5 called potential gamesmanship, we tried to as much as possible,
6 protect the Government's interest, set forth our basis for how
7 we're proceeding, make sure that the Court was alerted to the
8 fact that Judge Torres' orders were was in place, specifically
9 asked the Court in the second potential order to let us release
10 the application in full, including the tracing charts to
11 defense counsel, to tee up the challenge that we knew was going
12 to be coming.

13 **THE COURT:** Did you ask Judge Torres for a stay of his
14 order if it is an order?

15 **AUSA SOMBUNTHAM:** No. So this was the conversation
16 that we were having overall was that we were asking about the
17 stay, and Judge Torres -- sorry. We were asking about the stay
18 in terms of what their position was. They said that, you know,
19 obviously a stay requires a showing that we would succeed on
20 the merits. And I don't know standing here today that we will.
21 But I think we have arguments here that should persuade the
22 Court. And so we decided that in the meantime when we knew
23 that these assets and we were able to put that package another,
24 that these three, again that's a delay further alerting
25 everybody here of the issue that they were tainted assets. We

1 should do so. And again, our position that they're tainted
2 assets, we can't make a probable cause presentation, and we
3 need to present that to the Court, the grand jury, the
4 magistrate.

5 So even if we thought it was, I think there would have
6 been a dispute about that as well.

7 **THE COURT:** So what I'm trying to get from what you
8 just said is you're -- it seems like you're suggesting that if
9 I consider it a report and recommendation, the *lis pendens*
10 remains in place until I consider the objections to the report,
11 if it is a report; and then absent a stay issued by the Court,
12 then his order has removed the *lis pendens*.

13 **AUSA SOMBUNTHAM:** Yes.

14 **THE COURT:** Okay. So my earlier question was whether
15 or not I had issued an order on your *ex parte* application for
16 second post indictment protective order. My question was that:
17 Did -- was that necessary to restrain the assets?

18 **AUSA SOMBUNTHAM:** Yes.

19 **THE COURT:** And so your answer is what? Maybe?

20 **AUSA SOMBUNTHAM:** Yes. It's a classic attorney answer.
21 It depends on what the Court views in Judge Torres' orders.

22 **THE COURT:** Okay. So as I understood it, you objected
23 to the 30 days that the Defense requested to respond to the
24 objections -- well, first, do you object to 30 days for them to
25 respond to the objections?

1 **AUSA SOMBUNTHAM:** If needed, we don't object. We just
2 had no reasonable explanation. I think today Mr. Shohat
3 explained that Mr. Markus will be away next week. I think that
4 should be fine.

5 It's a little unclear if they were running the 30 days
6 from the time of our filing the objections or if they're asking
7 for an additional 30 days, I think that's an issue.

8 **THE COURT:** Okay. Anything else before I turn back to
9 the Defense?

10 **AUSA SCHIMKAT:** No, Your Honor.

11 **AUSA SOMBUNTHAM:** No, Your Honor.

12 **ATTORNEY SHOHAT:** Your Honor, first of all, regarding
13 the 30 days, we're asking for a total of 30 days, not another
14 30 days. Instead of 14 days being the deadline, 30 days be the
15 deadline.

16 When they called us or contacted us to ask us whether
17 we would agree for a stay, to a stay, I took that as a prelude
18 to a motion for stay. Would be agree to it? And therefore, it
19 could be an unopposed motion for a stay of Judge Torres'
20 orders. And of course we consulted and determined that that
21 would be inappropriate for us to do because we didn't believe
22 they could make the requisite showing of likelihood of success
23 on appeal, and as was communicated to the Court, that was the
24 position we gave the Government.

25 We anticipated that we would immediately get or shortly

1 get a motion for a stay. At no time during that discussion did
2 they say they were contemplating or in the process of seeking
3 an *ex parte* restraining order.

4 Regarding the *lis pendens*, if they had asked us in the
5 discussion about a stay whether we would agree not to alienate
6 the properties until the litigation was final, 'yes' would have
7 been our answer. And it's we want the Court to be very clear
8 today that we have no intention, until Your Honor enters a
9 final determination on Judge Torres' motion, to take any action
10 with respect to the *lis pendens*. Actually, it would be the
11 Government's action if you affirm Judge Torres' order to take
12 steps to left the *lis pendens*. The uniplay between that and
13 what the Government has done now is before the Court on our
14 motion to lift the *ex parte* restraining order.

15 Let us be clear about one thing: We do not agree, so
16 it's perfectly clear, and we'll fully flush this out in our
17 coming papers with Your Honor, we do not agree that either
18 *Gosney* or *Kaley* determines the issue of whether a defendant has
19 a right to a tracing hearing without a showing of need. In
20 both of those cases, the defendants made a showing of need.
21 The issue was not determined.

22 So we believe that issue is still an open issue and
23 we're going to lay out why it is not appropriate to allow the
24 Government to restrain assets they cannot trace notwithstanding
25 what has been presented to the Court. We intend to show the

1 Court that the tracing is inappropriate with respect to --
2 certainly to Mr. Rivera's property, and I believe Mr. Markus
3 intends to do the same with respect to Ms. Nuhfer's, that case
4 law in the Eleventh Circuit that they have not even mentioned
5 controls the situation and changes it dramatically, completely.
6 We'll lay all that out in our papers just so we're perfectly
7 clear on this issue.

8 And we think that given the fact that they now concede
9 that they knew, pretty much knew, that these assets would not
10 be -- are believed -- or believed these assets were traceable
11 and preparing a package to go to the grand jury in May or June
12 when Judge Torres entered a 23-page order in July is very
13 telling. And it's why we think the Court could not countenance
14 this procedure and lift that restraining order. We're not
15 going -- we stipulate that nothing will be done with those
16 properties until final determinations are made by Your Honor
17 and let us proceed accordingly. Thank you.

18 **THE COURT:** Is there -- if I do what you request and
19 vacate that order, the most recent order, is there -- I mean,
20 Judge Torres heard from -- heard argument from you all and any
21 representations from the Government were made specifically to
22 him regarding the properties. I mean, I'm familiar with the
23 issues. But is this something that -- I mean, ordinarily, I
24 would say, well, the judge who heard the issue regarding the
25 *lis pendens* should probably hear this as well to see if there

1 are any inconsistencies. But procedurally, we're in a posture
2 where that, his order or R and R has been rejected and so
3 procedurally, it's not really before him anyway.

4 **ATTORNEY MARKUS:** I don't think it matters one way or
5 the other, Your Honor, if it's before this Court or before
6 Judge Torres. Ultimately, I think it will be before this Court
7 either way, so may we save a little time if the Court vacates
8 it, we brief it, and it's before this Court on a parallel track
9 with the appeal of Judge Torres' order.

10 So I think whether you refer the motion or keep it,
11 it's both -- it's going to end up before the Court anyway and
12 of course the appeal objections are before the Court.

13 Just to point out, I think a couple things to
14 underscore. One is, again, there was no concern about the
15 properties being alienated. Before, we were in discussions
16 with the Government both about the stay and about the
17 properties themselves. And so we were not -- we could not have
18 done anything with the properties. The only way the *lis*
19 *pendens* could get lifted is if the Government went to the clerk
20 of the state court and lifted them. So there was no concern
21 about that when they came *ex parte* to the Court.

22 You know, the timing with the end of May and June with
23 them finalizing it, again, just to underscore what Mr. Shohat
24 said is so telling. They have said to us numerous times in
25 e-mails how important that Judge Torres' issue was to them.

1 They were waiting to see if they were going to get a favorable
2 decision. That's what was going on here. They lost and then
3 they came running to this Court *ex parte*, which was wrong.

4 I know this cost Judge Torres a lot of time writing
5 that order, but I'm here for Ms. Nuhfer. I mean, she's had to
6 scramble to come up with money to fight this *lis pendens* stuff
7 before Judge Torres for the last five months and now is going
8 to have to deal with this issue. It's not right. We were in
9 discussions with them. And they came *ex parte* to this Court
10 instead of just filing a normal motion. They waited to see
11 what would happen before Judge Torres, they lost, they got
12 caught, and then they came to this Court. It was wrong.

13 **THE COURT:** All right. Anything final, counsel?

14 **AUSA SOMBUNTHAM:** Your Honor, I just want clarify a
15 couple of things that defense counsel has made to make sure
16 that it's crystal clear before the Court.

17 The motion is not moot. There are two real properties
18 that are substitute assets as recently as last week. Defense
19 counsel's indicated those real properties would be required, or
20 they wanted those property, at least, because they haven't been
21 able to show need for fees.

22 So although we agree, you know, this timing is not the
23 best, there's no issue of mootness. If we thought there was an
24 issue of mootness, we would have raised that for sure before
25 the Court.

1 That's the first thing.

2 The second is the conversation about stay, and we've
3 outlined that in our response. If the Court really wants to
4 entertain that, we have the e-mails. Shortly after Judge
5 Torres issued their ruling and before the United States request
6 for a stay, defense counsel was asking us to release the *lis*
7 *pendens* so they can retain -- be retained as counsel. So I am
8 -- today is the first time that they have sort of agreed
9 overall. I understand that may not, you know, there's sort of
10 an open question about that. I've already told you during the
11 course of the last few weeks our position has changed between
12 what the orders were at the time versus now being an R and R.
13 That is definitely in a flux. This happened earlier this
14 month. We are here before the end of the month.

15 **THE COURT:** But I don't understand that argument. I
16 mean, well, I understand it. But if the Defense -- if you want
17 a stay and the Defense doesn't respond within a reasonable
18 period of time, 24 hours, 48 hours, on the agreement, then you
19 just file the motion. I mean, I don't understand why you would
20 wait until the Defense was on board. So what.

21 **AUSA SOMBUNTHAM:** So this is buttressing the other
22 thing that we were looking at at the time, which is trying to
23 finalize that these were traceable assets and present that
24 package in terms of being able to announce it. And obviously,
25 with the adverse ruling in place, this discussion all happened

1 after the adverse ruling.

2 And just to correct one more thing on your point, we
3 did not do oral arguments on the motion to release *lis pendens*.
4 We were highly anticipating there would be oral argument, so we
5 really were got off guard a little bit by Judge Torres' orders
6 earlier this month. So we haven't been able to address his
7 questions and our representations are all -- those are in the
8 docket in our filings. And one of the things we have raised in
9 our objection is to ask the Court for oral argument in light of
10 the ruling -- the rulings.

11 **THE COURT:** So the -- there was the motion to dissolve
12 the *lis pendens*, which I think was filed in March.

13 **AUSA SOMBUNTHAM:** Yes. March 13th, 2023.

14 **THE COURT:** The Government filed a response on
15 April 4th. And the reply wasn't until May 30th, which was --
16 and then the order wasn't issued until July.

17 **AUSA SOMBUNTHAM:** Yes. July 6th and 7th, I believe,
18 right after the Fourth of July holiday.

19 **THE COURT:** All right. Let's start with a couple of
20 observations, right.

21 So this issue was referred to Judge Torres. The issue
22 of course, was whether or not the properties or some of the
23 properties that the Government identified as substitute assets,
24 whether or not they could place a *lis pendens* on those
25 substitute assets either under federal or Florida law. And the

1 briefing on that issue was completed in May, on May 30th. And
2 Judge Torres issued what is titled as an Order on the Joint
3 Motion on July 6th. And I note that these were really
4 substantive issues that, undoubtedly, it took a lot of time to
5 consider.

6 But between -- well, some time between the Government's
7 response, the Government's April 4th response to the motion and
8 Judge Torres' order, the Government became aware that these
9 properties, at least in his opinion, were not substitute assets
10 but actually directly subject to forfeiture because they were
11 tainted assets. But the Government took no action in notifying
12 the Court or even requesting the Court to hold off on issuing
13 an order. There are a number of ways that could have been
14 done, just simply ask for the Court to hold off ruling based on
15 some other developments. But it didn't. And so the timing
16 here seems really bad. Judge Torres issued his order on
17 July 6th, and then the *ex parte* motion was submitted to me. It
18 was filed on July 14th.

19 The Government, of course, is saying that, you know,
20 just took time to put everything together to submit the *ex*
21 *parte* application. The -- Agent George's affidavit, which is
22 18 pages long with lots of detail about the properties and --
23 this chart tracing the properties, I mean, it's dated
24 July 14th. But it obviously took some time to put that
25 together.

1 You know, I reviewed the *ex parte* motion and everything
2 submitted for it in support of it. I recognized, I mean, at
3 the time, as I said before, I also reviewed the -- Judge
4 Torres' order and the objections and the underlying pleading.
5 So I was aware that the Government was taking a different
6 position. And as I said before, I had some questions, but I
7 didn't think it was appropriate for me to have any *ex parte*
8 communications with the Government about the questions that I
9 had, which include the questions that I asked her today.

10 Considering everything, I mean, I just think it --
11 well, and again, I think the affidavit -- I found that the
12 affidavit provided probable cause, which isn't a especially
13 high standard, showing that assets that the Government alleges
14 that the Defendants received is ill gotten gains, had flowed
15 through accounts and were used to purchase the substitute
16 properties. But given everything here and the timing, and
17 given the Defendant's agreement not to alienate the subject
18 property, I am going to vacate that earlier order, the *ex parte*
19 order. I am going to give -- well, Mr. Shohat, you said
20 30 days, extend the objection period to 30 days.

21 **ATTORNEY SHOHAT:** Yes, Your Honor.

22 **THE COURT:** From 30 days. The response time now to the
23 *ex parte* motion, you want that on the same date or what?

24 **ATTORNEY SHOHAT:** Could we have one second?

25 **THE COURT:** Sure.

1 **ATTORNEY MARKUS:** Your Honor, on the objections, we're
2 good for a total of 30 days. But I think on the other motions,
3 since we're going to need to now respond with our own tracing
4 analysis, we'd as for 30 days from today just to respond.

5 **THE COURT:** I'll just make both the objections and your
6 response to the --

7 **ATTORNEY MARKUS:** Yes.

8 **THE COURT:** -- *ex parte* application due 30 days from
9 today.

10 **ATTORNEY MARKUS:** Thank you, Your Honor.

11 **THE COURT:** I -- starting back from scratch, so to
12 speak, on the protective order, I think it's warranted here, so
13 that we're all -- there's no cloud over those proceedings. And
14 as I indicated earlier, the defendants agreeing not to alienate
15 any of the subject properties. So I don't think there's no
16 harm. So we'll see where we are at that point.

17 Anything else we need to take up today from the
18 Defense?

19 **ATTORNEY MARKUS:** The only other thing, Your Honor, the
20 arraignment, I believe is scheduled on August 14th. So we
21 would just ask that that be postponed until after this issue is
22 addressed.

23 **ATTORNEY SHOHAT:** I just want note that we have asked
24 the Government for discovery regarding the tracing at issues.
25 We have not brought this matter to the Court but they haven't

1 responded to us yet. We may have a motion if they don't give
2 us the discovery we've requested to allow us to appropriately
3 respond. We have asked them for it.

4 **THE COURT:** I'll let you deal with that with the
5 Government in the first instance and then we'll take it up.

6 So regarding the arraignment, you're asking that that
7 be continued for another?

8 **ATTORNEY MARKUS:** I think we should just take it off
9 the calendar for now, Your Honor, until this issue is resolved
10 or if we need a place setter, we can set it some time in
11 October. Yeah. Sometime in October, Your Honor.

12 **THE COURT:** Is there an objection to the Government
13 rescheduling the arraignment?

14 **AUSA SCHIMKAT:** No, Your Honor.

15 **THE COURT:** So we'll reschedule that for another
16 60 days.

17 Is there anything else from the Government?

18 **AUSA SOMBUNTHAM:** Your Honor, because Mr. Shohat raised
19 this, I think we're going to head on the same procedure that we
20 rest -- that we set forth that we have a difference of opinion
21 about how the challenge will proceed. I'm anticipating right
22 now that the briefing here would be on the initial application
23 for the protective order itself. And I think a threshold
24 showing here is required is a financial need from the defense,
25 from the defendants for this retained counsel and the *Barker*

1 factors. I don't think we are agreeing in this juncture to the
2 different procedure.

3 **THE COURT:** Well, there's an application pending.
4 Defense will respond and we'll see where we are.

5 **AUSA SOMBUNTHAM:** Okay. Okay. I just wanted to
6 clarify. Thank you, Your Honor.

7 **THE COURT:** All right. And if you'll just submit a
8 proposed order.

9 **ATTORNEY MARKUS:** Yes, Your Honor.

10 **THE COURT:** Thank you. Have a good weekend.

11 (Proceedings concluded at 10:51 a.m.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I certify that the foregoing pages represent a true and correct transcript of the official electronic sound recording as provided to me by the U.S. District Court, Southern District of Florida, as taken on the date and time previously stated in the above matter.

I certify that the foregoing pages represent a true and correct transcript of the above-styled proceedings as reported on the date, time, and location listed.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was reported, and further that I am not financially nor otherwise interested in the outcome of the above-entitled matter.

Date: August 30, 2023

/s/Quanincia S. Hill, RPR
Quanincia S. Hill, RPR
Official Court Reporter
Southern District of Florida